

ENTERED ON DEC 18 2005  
MC 2-18-05  
D. DA

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:

CASE NO. 05-90125

Andrew Ross Desmond,

CHAPTER 7

Debtor.

JUDGE MASSEY

Andrew Ross Desmond,

Movant,

v.

CONTESTED MATTER

Fayette County, Georgia Water System,

Respondent.

ORDER DENYING EMERGENCY MOTION  
REQUIRING FAYETTE COUNTY WATER SYSTEM TO RESTORE SERVICE

Debtor filed this Chapter 7 case on January 4, 2005. On February 18, 2005, he filed an emergency motion seeking an order requiring the Fayette County Water System ("FCWS") to restore water service to property he identified as 135 Felton Drive. Debtor alleges that service was disconnected first on February 16, 2005, and after a short period of service, disconnected again on February 18, 2005. Debtor contends that the actions of FCWS violated the automatic stay imposed by 11 U.S.C. § 362(a). Debtor is mistaken and would be well advised to seek legal assistance instead of trying to figure out the intricacies of bankruptcy law himself.

Generally speaking, creditors cannot be forced to deal with persons or companies that have filed bankruptcy. It is a free country. There is an exception for utilities because utilities are monopolies. Section 368 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 368. The import of subsection (a) is that a utility cannot cut off service *solely* on the basis that a person or company has filed bankruptcy or owes a prepetition debt for utilities. If there is a good reason for cutting off service other than the fact of bankruptcy and the fact of non-payment of prepetition debt, subsection (a) is not a bar to cutting off service.

Section 368(b) makes it clear that a debtor or trustee must act within twenty days of the filing of a voluntary bankruptcy case (which constitutes the "order for relief") to assure the utility that it will be paid. If the debtor or trustee does not do so, the utility is within its rights to cut off service. The purpose of this subsection is obvious. It is to balance the requirement that a utility provide service postpetition with more than a possibly unreliable promise of a debtor or trustee to pay for service postpetition. As this subsection plainly states, the debtor or trustee must propose to the utility a method of adequately assuring the utility of future performance, such as by posting a deposit. If the parties cannot agree, the utility is not obligated to provide service unless the debtor or trustee obtains an order from the Court requiring the utility to continue to provide service. The Court has the power to do this if and only if the debtor or trustee can convince the Court that the amount of the deposit or other security is sufficient to insure that the utility will not be left holding

the bag a second time. (In Chapter 11 cases involving corporations that have adequate operating capital or financing, the fact of cash on hand or the ability to borrow may suffice.)

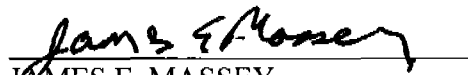
In a Chapter 7 case, the trustee has no obligation to provide such assurance of future performance to a utility except where necessary to protect the value of the property of the estate and then only if there is cash or property in the estate that could be used to provide such assurance. Debtor has not shown that the 135 Felton Drive property to which the motion is directed and in which he asserts only an "equitable interest" has any value to the estate for the benefit of creditors. Nor has he shown that the estate has cash or other property sufficient to provide such assurance and that it would make business sense to do so with respect to the Felton Drive property. Where a Chapter 7 trustee chooses for business reasons not to provide adequate assurance of future payment to a utility, the debtor is free to do so at the debtor's own expense. Debtor has failed to allege in the motion that he has complied with section 368(b) or has the ability to provide assurance to FCWS that it will be paid for postpetition service.

Under the circumstances described, Debtor has failed to show that the utility violated section 368. Nothing in section 362, imposing the automatic stay, requires a utility to continue to provide service to a debtor.

For these reasons, it is

ORDERED that Debtor's Emergency Motion to require Fayette County Water System to restore service is DENIED without prejudice.

Dated: February 18, 2005.

  
JAMES E. MASSEY  
U.S. BANKRUPTCY JUDGE